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IN THE SUPREME COURT OF GEORGIA

SEPTEMBER TERM, 1944

Number 14,971

PARKE, DAVIS AND COMPANY

versus

J. EUGENE COOK, AS COMMISSIONER OF THE STATE REVENUE DEPARTMENT

STATEMENT OF JURISDICTION

In this suit, it was sought to recover taxes alleged illegally to have been paid, on the ground that the exaction of such taxes was contrary to the Constitution of the United States, as is more fully set out in the assignment of errors. Jurisdiction in the Supreme Court of Georgia existed because a constitutional question was involved, which question was decided against petitioner by the Supreme Court of Georgia in its final judgment.

This suit was authorized in the form in which it was brought by *Georgia Code, Sections, 92-3308 and 92-3310,* taken from the *Acts of 1931, Extra Session, pages 54 and 55.* Copies of these sections are attached hereto. The defendant in error contended that these sections could not

be followed in this case. However, as that issue was decided in favor of the plaintiff in error in the Supreme Court of Georgia, discussion with reference thereto is not necessary.

The statutes here involved are the *Act of the Georgia Legislature approved March 30, 1937*, now the *Code Sections above*, and *Sections 92-3002, 92-3109, and 92-3113*. The applicable provisions of the *Act of March 30, 1937*, now *Section 92-3113 of the Code*, are printed in *Georgia Laws of 1937, pages 109-148*. These provisions are: *Section 1, paragraph n, page 114; Section 8, paragraph a, page 126;* and *Section 9 in full, pages 129 to 133, inclusive*, copies of which are attached hereto.

Jurisdiction of the Supreme Court of the United States arises under the provisions of *Judicial Code, Section 237; U. S. Code, Title 28, Section 344, paragraph (a)*.

The date of the judgment of the Supreme Court of Georgia is October 13, 1944, and the date of filing this petition for appeal is November 1, 1944.

The rule which may be said to have been definitely established by the Supreme Court of the United States is that no formula of apportionment can be upheld if it is arbitrary, burdens interstate commerce, or denies due process of law or equal protection of law.

If the business of the corporation within the taxing state is independently conducted, or the income derived therefrom is separable, no formula of apportionment may be applied, for "theories of allocation can have no place in the inquiry if the net income within the state stands on its own footing unmixed with outside business."

Without reference to any other question, it is apparent from a consideration of the statute that the "sales ratio" factor of the Georgia apportionment formula is inherently arbitrary on its face, with the result that the effect of

applying it is necessarily to subject to taxation by the State income not derived from property owned or business done in the State.

The apportionment formula embodies three factors which are given equal weight in computing the proportion of the entire net income of the corporation which the State will tax. Any formula of apportionment to be sustainable, must have a reasonable relation to the business of the corporation. *Alpha Portland Cement Company* versus *Massachusetts,* 268 U. S. 203.

In no case can the State levy a tax on, or based on, gross receipts from interstate transactions, or discriminate against interstate commerce in the admeasurement of a net income tax. *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *J. D. Adams Mfg. Co.* v. *Storen,* 304 U. S. 307; *Gwin, White & Prince* v. *Henneford,* 305 U. S. 434.

It has definitely been established that gross income earned throughout the country cannot be made the basis of an income tax within a state. This is the decision in the three cases next above, and in the *Adams Manufacturing Company* case, the Court said:

> "We conclude that the tax is what it purports to be,—a tax upon gross receipts from commerce. * * * The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article 1, Section 8, of the Constitution."

It is also respectfully submitted that cases cited by the Supreme Court of Georgia in its opinion herein do not sustain that opinion, and are not in conflict with the broad principle stated above. The principle which we contend applies here is supported by: *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, cited and followed: *United States* v. *Rock Royal Corporation*, 307 U. S. 563, 568, 569; *Mulford* v. *Smith*, 307 U. S. 38, 48; *Currin* v. *Wallace*, 306 U. S. 1, 10.

The opinion of the Supreme Court of Georgia, sent up as part of the record, is made a part of this statement, and should be attached hereto when this statement is printed. Also attached hereto are copies of the procedural and apportionment sections of the statutes of Georgia involved here. This statement is made to conform to Rule 12 of the Rules of the Supreme Court of the United States, and specifically, attention is directed to the provisions of paragraph 3 of said Rule.

WHEREFORE, it is respectfully submitted that the jurisdiction of this Court lies, and this appeal is the correct way of invoking that jurisdiction.

This 1st day of November, 1944.

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APPENDIX "A"

Copy of Section 92-3308, Georgia Code of 1933:

"*92-3308.* Claim for Refund; Limitations; Hearing; Interest.—A taxpayer may file a claim with the State Revenue Commission for the refund of any tax assessed against him, at any time within three years from the time of payment of the tax, whether or not the tax has been paid under protest. The Commission shall grant a hearing thereon, and if upon such hearing it shall be determined that there has been an overpayment of any tax imposed by this law, the amount of such overpayment shall be refunded to the taxpayer, together with interest at six per centum per annum from the date of such overpayment. (Acts 1931, Extra. Sess., p. 54; 1931, pp. 7, 35.)"

Copy of Section 92-3310, Georgia Code of 1933:

"*92-3310.* Suit for Recovery of Tax Illegally Assessed or Collected; Conditions Precedent; Limitations.—No suit or proceedings shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, or of any penalty or interest claimed to have been excessive or in any manner wrongfully collected, until a claim for refund has been duly filed with the State Revenue Commission; no such suit or proceeding shall be begun before the expiration of three months from the date of filing such claim, unless the Commission renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax or penalty, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commission shall, within 90 days after any such disallowance, notify the taxpayer by mail. (Acts 1931, Extra. Sess., p. 55; 1931, pp. 7, 35.)"

Copy of Paragraph (n), Section 1, of An Act to Amend Title 92 ("Public Revenue"), etc., as printed on page 114, Georgia Laws, 1937:

"(n) The word 'sale or sales' wherever appearing in this Act for the purpose of apportioning net income to

Georgia shall be deemed to be the total value of all sales made through or by the offices, agencies, or branches located within this State, regardless of the destination."

Copy of Paragraph (a), Section 8, of above Act, as printed on page 126, Georgia Laws, 1937:

"(a) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries, or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition of the continued use or possession, for the purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he had no equity. Expense incurred in earning non-taxable income is not an allowable deduction from the taxable income before computing the tax."

Copy of Section 9 of above Act, as printed on pages 129-133, inclusive, Georgia Laws, 1937:

"Section 9. That Title 92, Division 1, Part 9, Chapter 92-31, of the Code of Georgia of 1933, as amended by the Act approved March 26, 1935, Acts of 1935, Page 127, be further amended by striking in its entirety Section 92-3113, as amended and inserting in lieu thereof the following:

" '92-3113. Corporation; Allocation and Apportionment of Income. The tax imposed by this law shall apply to the entire net income, as herein defined, received by every domestic corporation, and every foreign corporation owning property or doing business in this State.

" '(a) If the entire business income of the corporation is derived from property owned or business done in the State, the tax shall be imposed on the entire business income, but if the business income of the corporation is derived in part from property owned or business done in the State and in part from property owned or business done without the State, the tax shall be imposed only on the portion of

the business income reasonably attributable to the property owned and business done within the State, to be determined as follows:

" '(1) Interest received on bonds and dividends received on stocks held for investment are not subject to allocation except as they may be used to reduce apportionable interest paid. Rentals received from real estate held purely for investment purposes and not used in the operation of the business are not subject to apportionment. All expenses connected with the interest, dividends, and rentals realized from investments such as the above are not subject to apportionment, but must be applied against the investment income. The taxability of the net investment income depends upon the situs of the investment property or the situs of the corporation.

" '(2) Gains from the sale of tangible or intangible property not held, owned, or used in connection with the trade or business of the corporation, nor for sale in the regular course of business shall be allocated to the State if the property sold is real or tangible personal property situated in the State or intangible property not connected with the business in the State; otherwise such gains shall be allocated outside the State.

" '(3) Net income of the above classes having been separately allocated and deducted as above provided, the remainder of the net business income of a corporation shall be allocated and apportioned as follows:

" 'a. Where income is derived principally from the holding and/or sale of intangible property, having a taxable situs in this State, the tax shall be imposed on the entire business income; if a portion of such intangible property has a taxable situs without the State, the portion of the income derived from the holding and/or sale of such property attributable to this State shall be taken to be such percentage as the gross receipts from such intangible property in this State for the taxable year bear to the total gross receipts from such sources; Provided, that the taxable situs of intangible property held or owned by any

domestic corporation or by any foreign corporation whose principal place of business is in Georgia, shall be deemed to be in the State of Georgia, notwithstanding any domicile of any such corporation established elsewhere.

" 'b. Where income is derived from business other than the manufacture or sale of tangible personal property, or from the holding or sale of intangible property, or the conduct of a public utility, the portion thereof attributable to business within the State shall be taken to be such percentage of the total of such income as the tangible personal property owned, held, or used in the State in the conduct of such business and expense within the State of conducting the business bear to the total tangible personal property and total expense of conducting the business and the two percentages averaged; Provided: that if such corporation is a domestic corporation, or a domesticated or foreign corporation having its principal place of business within this State, all salaries paid general officers shall be deemed expenses within the State of conducting such business irrespective of the place of residence of any such officer or the place of actual payment of such salary. Provided further, that if such corporation uses or employs in the conduct of its business tangible property held or owned by such corporation other than tangible personal property, the reasonable annual rental value thereof, not exceeding ten per cent. of the cost of said property, shall for the purposes of this section be deemed a part of the expense of conducting such business.

" 'c. Where income is derived from the manufacture or sale of tangible personal property, the portion thereof attributable to business within the State shall be taken to be such percentage of the total of such income apportionable to Georgia determined as follows:

" '1. Tangible property ratio. The ratio of the tangible property, real, personal, and mixed, owned and used by the taxpayer in Georgia in connection with the trade or business during the income year to the total of such tangible property of the taxpayer owned and used in connection with the trade or business everywhere. Cash on hand or in

bank, shares of stocks, notes, bonds, accounts receivable or other evidence of indebtedness, special privileges, franchises, patents, and good will; or property, the income from which is not taxable or is specifically allocated shall not be considered tangible property nor included in the apportionment.

"'2. Manufacturing cost ratio. The ratio of the total cost of manufacturing, collecting, assembling or processing within this State to the total cost of manufacturing, collecting, assembling or processing everywhere. The term "cost of manufacturing, collecting, assembling, or processing within this State and everywhere" as used herein shall be interpreted in a manner to conform as nearly as may be possible to the best accounting practice in the trade or business, unless, in the opinion of the Revenue Commission, the peculiar circumstances in any case justify a different treatment. This term shall be generally interpreted to include as elements of cost within this State the following:

"'a. The total cost of all goods, materials, and supplies used in manufacturing, assembling, or processing within this State regardless of where purchased.

"'b. The total wages and salaries paid or incurred during the income year in this State in such manufacturing, assembling or processing activities.

"'c. The total overhead or manufacturing burden properly assignable according to good accounting practice to such manufacturing, assembling, or processing activities within this State including only such expenses as are allowable deductions for determining taxable net income as provided by this Act.

"'3. Sales ratio. The ratio of the total sales made through or by offices, agencies, or branches located in Georgia during the income year to the total net sales made everywhere during said income year. The tangible property ratio, the manufacturing cost ratio, and the sales ratio being separately determined and the three percentages averaged.

" 'd. Where income is derived principally from the holding and/or sale of tangible personal property having a taxable situs in this State, the taxable income shall be apportioned as follows:

" '1. Real estate and tangible personalty. The ratio of the value of its real estate and tangible personal property in this State on the date of the close of the income year of such company to the value of its entire real estate and tangible personal property then owned by it with no deduction on account of incumbrances thereon.

" '2. Sales. The ratio of the total sales made through or by its offices, agencies, or branches located in Georgia during the income year to the total sales made everywhere during said income year. The tangible property ratio and the sales ratio being separately determined and the two percentages averaged.

" 'e. Where one corporation owns stock in another corporation, the tangible property within or without the State, owned or held by any stockholder of any such corporation owning 50% or more of its capital stock, or by any other corporation in which the majority of the capital stock is held or owned by such taxpayer corporation or its stockholders, or any other corporation, controlled by such taxpayer corporation, or its stockholders, through ownership of stock or otherwise, and used or employed by such taxpayer corporation in the conduct of its business, shall be deemed the tangible property of such taxpayer corporation for the purposes of this section.' "

Filed in office November 4, 1944. K. C. Bleckley, C.S.C.Ga.

APPENDIX "B"

SUPREME COURT OF GEORGIA

Decided October 13, 1944

No. 14971

PARKE, DAVIS & COMPANY,

vs.

COOK, State Revenue Commissioner

By THE COURT:

1. The suit for a refund of income tax, alleged to have been improperly collected, was properly brought in the superior court of Fulton County.

2. Sales made as those of the plaintiff in error were made in this case were properly classified as "Georgia sales," under the provisions of the Code, § 92-3113, as amended by the act of March 30, 1937.

3. The inclusion as "Georgia sales" of sales made as those of the plaintiff in error were made in this case did not violate the due-process clause or the commerce clause of the constitution of the United States, as being a tax on business carried on wholly in States other than Georgia.

4. The inclusion as "Georgia sales" of sales made as those of the plaintiff in error were made in this case, where shipments were made to customers in States other than Georgia, did not violate the due-process clause or the commerce clause of the constitution of the United States as being a burden on interstate commerce.

Parke, Davis and Company filed suit in Fulton superior court against J. Eugene Cook, as commissioner of revenue of the State of Georgia, in which substantially the following allegations were made: The plaintiff is a corporation of the State of Michigan, with its principal office in Detroit, and a general sales office at Baltimore, Mary-

land. Its business is that of manufacturing and selling pharmaceutical products and supplies. All manufacturing is done in States other than Georgia. Sales are made through salesmen, who are employed by and work under the supervision of the general sales manager at Baltimore, and travel the territory to which they are assigned. They are not authorized to make contracts, but take orders, which are forwarded to the Baltimore office for acceptance or rejection by the sales manager there. When an order is accepted, and a contract of purchase and sale thus results, shipment is made to the purchaser from the most convenient storage depot. The plaintiff maintains a stock of manufactured goods at Atlanta, Georgia, in a storage warehouse known as the Atlanta depot. The storekeeper in charge of this warehouse has no authority to accept orders for goods and does not receive or accept such orders. The accounts of customers are payable at Detroit or Baltimore, and the storekeeper at the Atlanta warehouse makes no collections. In the calendar year 1938 goods to the value of $462,441.02, and in the calendar year 1939 goods to the value of $521,560.40, were shipped from the Atlanta warehouse. All of these shipments were made pursuant to orders taken by the traveling salesmen and transmitted to Baltimore for acceptance or rejection, and on shipping instructions received by the storekeeper in charge of the Atlanta warehouse from the general sales office in Baltimore. Goods are shipped from the Atlanta warehouse only upon shipping instructions from the Baltimore sales office. Of the shipments made from Atlanta in 1938, goods to the value of $248,793.27 were shipped to purchasers within the State of Georgia; the remainder to customers in other States. In 1939, goods to the value of $249,770.95 were shipped from Atlanta to customers in Georgia, and the remainder to purchasers in other States. The State revenue commissioner assessed income taxes against the plaintiff for each of the years 1938 and 1939, by applying to its entire net income the apportionment formula prescribed by the act of March 30, 1937 (Ga. Laws 1937, pp. 109, 129; Code, § 92-3113). This formula provides for determining the taxable proportion of the entire business income of a

corporation doing business within and without the State by the use of three factors which are described as: (1) tangible-property ratio, (2) manufacturing and cost ratio, and (3) sales ratio. In making its return for 1938, and in computing the tax due, the plaintiff included as "Georgia sales" in the "sales-ratio" factor of the apportionment formula, all goods shipped to purchasers in Georgia from the Atlanta warehouse. This resulted in a tax which the plaintiff paid without complaint. The suit does not seek to recover this payment. The commissioner recomputed the tax by adding to "Georgia sales" in the "sales-ratio" factor of the apportionment formula all goods shipped from the Atlanta warehouse to purchasers in other States. This resulted in an additional assessment of $1337.63, which the plaintiff paid under protest, and filed an application for a refund. The application was denied and the suit was to recover this amount. For the year 1939, the commissioner again assessed income taxes against the plaintiff, following the method already described. Of the amount assessed, $1762.42 was because of the inclusion as "Georgia sales" in the "sales-ratio" factor of the apportionment formula shipments made from the Atlanta warehouse to purchasers within Georgia. This amount the plaintiff paid under protest, and applied for a refund. The application was denied and the suit also seeks to recover that amount. Of the additional assessment for 1939, $1597.30 was on account of the inclusion as "Georgia sales" in the "sales-ratio" factor of shipments made from the Atlanta warehouse to purchasers in States other than Georgia. This much of the assessment has not been paid, and the suit seeks to have it cancelled.

The defendant filed a general demurrer to the petition. The trial court sustained the general demurrer, and dismissed the petition. The exception is to this judgment.

WYATT, *Justice:*

1. The first question here for consideration is one of procedure. The petition is expressly brought under the Code, § 92-3310, which provides as follows: "No suit or proceedings shall be maintained in any court for the recov-

ery of any tax alleged to have been erroneously or illegally assessed or collected, or of any penalty or interest claimed to have been excessive or in any manner wrongfully collected, until a claim for refund has been duly filed with the State revenue commission; no such suit or proceeding shall be begun before the expiration of three months from the date of filing such claim, unless the commission renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax or penalty, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which suit or proceeding relates. The commission shall, within 90 days after any such disallowance, notify the taxpayer by mail." This Code section was codified from the 1931 income tax act. See Ga. L., 1931, Ex. Sess., p. 55, § 43.

The defendant in error contends that this proceeding is governed by the act for the "Administration of Taxing Laws" (Ga. L. Ex. Sess. 1937-38, p. 95, § 34(b)), reading as follows: "In any case in which it shall be determined that an erroneous or illegal collection of tax or license has been made by the commissioner, the taxpayer from whom such tax or license was collected may file a claim for refund with the said commissioner in writing and in such form and containing such information as the commissioner may require, to include a summary statement of the grounds upon which the taxpayer relies. In the event the taxpayer desires a conference or hearing before the commissioner in connection with any claim for refund, he shall so specify in writing in the claim, and if the claim conforms with the requirements of this section, the said commissioner shall grant such a conference at a time he shall specify. The commissioner shall consider information contained in taxpayer's claims for refund and such other information as may be available and shall approve or disapprove the taxpayer's claim and notify such taxpayer of his action. In the event any claim for refund is approved, the commissioner shall forthwith proceed under subsection (a) of this section to give effect to the terms thereof. Provided, further, that the taxpayer whose claim for refund is de-

nied by the commissioner under the terms of this act, shall have the right to sue for refund in the superior court of the county in which said taxpayer would have a right to appeal from a judgment by the Board of Tax Appeals, as in this case provided." It is contended that the general demurrer was properly sustained because the petition failed to show that the claim for refund was in writing as required by this section, and because the petition failed to show that there had been a legal determination that an erroneous or illegal collection of the tax by the commissioner had been made prior to the filing of the claim for refund. We deem it unnecessary to cite authorities for the well-settled principle of law in this State to the effect that, when an instrument is required by law to be in writing and a petition describes the instrument to be in compliance with the law, as against a general demurrer, the instrument will be presumed to be in writing.

We can understand the force of the argument that, before a claim for refund is filed with the revenue commissioner there should be a legal determination that the tax was erroneously or illegally collected by the commissioner. In the instant case, however, the petition alleges that payment of the tax was made under protest on January 20, 1942; and "promptly thereafter a claim was made for a refund thereof." The refund was not formally denied until January 4, 1944.

In 1941, the General Assembly of Georgia amended the tax act of 1938, limiting the jurisdiction of the Board of Tax Appeals to the review of assessments on tax returns for ad valorem taxes, and provided: "All cases, matters, claims, and controversies of whatsoever nature except those relating to the assessments of which jurisdiction in the State Board of Tax Appeals is retained by this act shall, upon the approval of this act, be recommitted to the State revenue commissioner who shall thereupon proceed to pass upon and determine any questions therein presented or involved. Any such ruling by the State revenue commissioner shall be subject to review by the courts as now provided for by said act of January 3rd, 1938, as fully as if such rulings had been reviewed by the State Board of Tax Appeals." Ga. L. 1941, p. 202, § 2.

Regardless of what was the state of the law on this question before the act of 1941, it seems clear that the above-quoted provisions of this act conferred upon the State revenue commissioner authority to determine in the first instance the question presented in the controversy now under consideration, and provided for a review of his ruling in the exact manner followed by the plaintiff in this case. To hold otherwise, would in fact close the doors of all courts and tribunals to the plaintiff in error with reference to any review of the ruling of the commission in the instant case; and that without any fault of negligence on its part. This result should and will be presented by this court. We hold that the proceeding and the suit for refund in this case have been properly brought.

2. The assignments of error are eight in number. However, the plaintiff in error, in its brief, very conveniently groups the questions raised into three divisions, and we thus deal with them in this opinion.

The first question, as stated by this brief, is as follows: "Does § 92-3113 of the Code as amended by the act of March 30, 1937, contemplate that there shall be included as 'Georgia sales' in the apportionment formula, sales made as the sales of the plaintiff are made? If it does so contemplate, is the department correct in construing the formula to require the inclusion as 'Georgia sales' of all sales made as those of the plaintiff are made, and completed by deliveries from the Atlanta storage warehouse in both interstate and intrastate commerce?"

So much of the Code, § 92-3113, as is here applicable reads as follows: "C. Where income is derived from the manufacture or sale of tangible personal property, the portion thereof attributable to business within the State shall be taken to be such percentage of the total of such income apportionable to Georgia determined as follows: 1. Tangible property ratio. The ratio of the tangible property, real and personal, and mixed, owned and used by the taxpayer in Georgia in connection with the trade or business during the income year to the total of such tangible property of the taxpayer owned and used in connection with the trade or business everywhere. Cash on hand or in bank,

shares of stocks, notes, bonds, accounts receivable or other evidence of indebtedness, special privileges, franchises, patents, and good will; or property, the income from which is not taxable or is specifically allocated shall not be considered tangible cost ratio. The ratio of the total cost of manufacturing, collecting, assembling or processing within this State to the total cost of manufacturing, collecting, assembling, or processing everywhere. The term 'cost of manufacturing, collecting, assembling, or processing within this State and everywhere' as used herein shall be interpreted in a manner to conform as nearly as may be possible, to the best accounting practices in the trade or business, unless, in the opinion of the revenue commission, the peculiar circumstances in any case justify a different treatment. This term shall be generally interpreted to include as elements of cost within this State the following: a. The total cost of all goods, materials, and supplies used in manufacturing, assembling, or processing within this State regardless of where purchased. b. The total wages and salaries paid or incurred during the income year in this State in such manufacturing, assembling, or processing activities. c. The total overhead or manufacturing burden properly assignable according to good accounting practice to such manufacturing, assembling, or processing activities within this State including only such expenses as are allowable deductions for determining taxable net income as provided by Part IX of this Title. 3. Sales ratio. The ratio of the total sales made through or by offices, agencies, or branches located in Georgia during the income year to the total net sales made everywhere during said income year. The tangible property ratio, the manufacturing cost ratio, and the sales ratio being separately determined and the three percentages averaged."

We are dealing here with the levy of a net income tax against a taxpayer which is engaged in a business extending over many States. The evident purpose of the act in question is to require the taxpayer to pay to the State of Georgia income tax on that portion of its business fairly attributable to its Georgia activities. The "sales ratio" of the taxing formula above-quoted is here brought in question. Do sales made in the manner alleged in the

petition, for the purpose of this act, levying a net-income tax on a proportionate basis, amount to "sales made through or by offices, agencies, or branches located in Georgia?" There is no contention that the plaintiff in error does not "own property or do business in this State." What is done in this State? A stock of goods is kept in a warehouse in Georgia; orders for goods are received and approved at the office of the corporation in Baltimore, Maryland, and forwarded to this warehouse; the orders are filled by the person in charge of the warehouse, and actual delivery of the goods is made in Georgia—in the case of residents by actual delivery to them, and in the case of non-residents by delivery to the common carrier, which is tantamount to delivery to the purchaser. Since delivery is made in Georgia to both Georgia purchasers and non-resident purchasers, in so far as shipments from the Georgia warehouse are concerned, title passes in Georgia as to both classes of purchasers. See Code, § 96-107; *Kehrer* v. *Stewart*, 117 Ga. 969; *Mann* v. *Glauber*, 96 Ga. 795.

By numerous decisions, this court is committed to the proposition that a corporation may not escape the payment of taxes on personal or tangible property located within the State of Georgia by maintaining a non-resident home office, and thereby creating the fiction of a non-resident tax situs for such property. We see no reason why the same reasoning as to the payment of income tax should not apply to a corporation doing business in many States; otherwise, the person or corporation thus engaged in business could split up its business activities so as to avoid paying its just share of the burden of income tax in all States.

We do not understand that there is any contention that a State cannot under any circumstances levy and collect a tax of the nature here in question. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, and a number of other decisions clearly support such right. We do hold that sales made in the manner described in this petition, both as to residents and non-residents of Georgia, in the sense used in this income tax act, amounted to "sales made through or by offices, agencies, or branches located in Georgia."

3. The second question argued in the brief of the plaintiff in error is as follows: "If § 92-3113 of the Code, properly construed, does provide that sales made as those of the plaintiff are made shall be included as 'Georgia sales' in the sales-ratio factor of the formula of apportionment, does the act for that reason offend the due-process clause of the fourteenth amendment of the constitution of the United States, or the commerce clause of the constitution of the United States, because the effect of the formula as so construed is to subject to taxation by the State property and business of the plaintiff carried on wholly in other States, or to burden interstate commerce?"

The question here raised is whether or not the income tax act as applied in the instant case had the effect of taxing the business of the taxpayer carried on wholly in other States, and thus became a burden upon interstate commerce. If the State of Georgia had the authority to levy a fair income tax against the overall business of the taxpayer fairly proportionate to its Georgia activities, and if the formula here adopted was based upon business done in Georgia or sales made in Georgia—and we have thus held—then, of course, the effect of the taxing formula was not to levy a tax on business of the plaintiff carried on wholly in other States, and we so hold.

4. The third question raised in the brief of the plaintiff in error is as follows: "If § 92-3113 of the Code, as amended, properly construed, requires that sales of plaintiff which are completed by shipments from the Atlanta warehouse to customers in other States be included as 'Georgia sales' in the sales-ratio factor of the apportionment formula, does the section, as so construed, offend the due-process clause of the fourteenth amendment or the commerce clause of the Federal constitution, for the reasons indicated in the foregoing paragraph?"

We have held in this opinion that shipments made from the Georgia warehouse to non-residents of Georgia were, for the purposes of the statute now under consideration, upon the same basis as shipments to Georgia purchasers. In so far as the taxpayer in this case is concerned, identically the same acts were performed as to non-resident

purchasers as were performed as to resident purchasers, the only different being that in the case of non-resident purchasers the goods were carried by common carrier across State lines. This was not true in the case of resident purchasers. We think that this makes no difference in so far as the constitutional questions here raised are concerned.

American Steel and Wire Co. v. Speed (192 U. S. 500) holds in effect that a State not precluded by the commerce clause of the Federal constitution from imposing a merchant's tax upon a non-resident manfacturing corporation which has selected a city of that State as a distributing point, and has secured a local transfer company to take charge of its products when shipped to that point, assort them, store them in a warehouse, and make delivery in the original packages to the customers of the manufacturer, either as expressly directed by it, or under general directions in favor of its recognized and approved customers, whose names were furnished to the transfer company, since, under such circumstances, the goods, when stored in the warehouse, were no longer in transit, but had reached their destination, and were held in the State for sale.

"A State, in levying a general income tax upon the gains and profits of a domestic corporation, may include in the computation of the net income derived from transactions in interstate commerce, without contravening the commerce clause of the Federal constitution, where there is no discrimination against interstate commerce either in the admeasurement of the tax or in the means adopted for enforcit." U. S. Glue Co. v. Oak Creek, U. S. (62 L. ed. 1135). See also Underwood Typewriter Co. v. Chamberlain, U. S. (65 L. ed. 165); International Harvester Co. v. Wisconsin Dept. of Taxation (decided by the United States Supreme Court on May 29, 1844, and not yet published). There are many cases laying down the same principle of law as discussed in the above-cited decisions.

In the instant case, it appears that the income tax act in question simply levied a tax on the business of a corporation, and, in order to reach a fair and reasonable ratio, included in the computation the net income derived from

transactions in interstate commerce, but did not discriminate against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing the tax. Therefore we hold that the tax act in question did not amount to a burden on interstate commerce, or violate any constitutional provision under the questions raised by the plaintiff in error.

It follows that there was no error in sustaining the general demurrer and dismissing the petition.

Judgment affirmed. All the Justices concur.